Filed 11/16/09 In re M.S. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re M.S., a Person Coming Under the Juvenile Court Law.	
MERCED CO. HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. A.S., Defendant and Appellant.	F057387 (Super. Ct. No. JV27857) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. Harry L. Jacobs, Commissioner.

Darlene Azevedo Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

James N. Fincher, County Counsel, and James B. Tarhalla, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Vartabedian, Acting P.J., Levy, J. and Kane, J.

A.S. (mother) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26) to her three-year-old daughter, M.[1] Just before M. turned three years old, she suffered cerebral edema, water intoxication and altered mental state as a result of mother's cruel treatment. This led the Merced County Superior Court to exercise its dependency jurisdiction over M. (§ 300, subds. (a), (b), (e), & (i)), remove the child from parental custody, and deny mother reunification services (§ 361.5, subd. (b)(5)). The court in turn set a section 366.26 hearing to select and implement a permanent plan for M.

Mother challenged the court's setting order by way of a petition to this court for extraordinary writ review. In it, she alleged her "attorney failed to present key factors pertaining to my case, and didn[']t perpair *[sic]* me." She did not specify what key information was not presented or explain how her attorney could have better prepared her for taking the stand.

We interpreted mother's scant argument as a claim of her attorney's ineffective assistance. Upon review of the record and the pertinent law, this court issued a written opinion in which we concluded her claim failed for reasons that we discussed.[2]

In this appeal, mother contends our opinion on her writ petition was not "'decided on the merits'" and therefore she may reargue and significantly expand upon her previous claim. She in turn attacks both the court's jurisdictional findings and dispositional order denying her services. Mother also argues there was insufficient evidence to support the court's finding at the termination hearing that it was likely M. would be adopted. Mother further joins in arguments raised in the father's appeal (*In re M.S.*; F057584).

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1 All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2 We have taken judicial notice of the mother's writ petition and our opinion in the writ proceeding, *A.S. v. Superior Court*, F056575.

On review, we affirm. This court decided mother's previous writ petition on its merits. Consequently, the law forecloses her from attacking the trial court's jurisdictional and dispositional findings and orders on this appeal. We also conclude there was substantial evidence to support the court's adoptability finding. As for the father's appeal, we also affirm.

PROCEDURAL AND FACTUAL HISTORY

We begin the history of this case by reciting our statement of the case and facts from our earlier opinion.

"The incident giving rise to dependency proceedings occurred in early July 2008. M., just two weeks shy of her third birthday, and petitioner were at a swimming pool located at an apartment complex. Witnesses stated petitioner was trying to teach M. to swim by repeatedly throwing her into the pool and encouraging her to paddle toward her. Instead, M. went under water, frantically grabbed at the sides of the pool and vomited water. Petitioner was overheard to say, 'This bitch is gonna learn how to swim if it kills her.' A witness intervened and took M. to the witness's apartment for a nap. Following a 20-30 minute nap, M. woke up shaking and vomiting and her eyes were rolling back in her head. Petitioner waited several hours before taking M. to the hospital. By that time, M. was losing consciousness.

"M. was admitted to the hospital and diagnosed with cerebral edema, water intoxication and altered mental state. However, petitioner's abuse did not stop with M.'s admission to the hospital. A nurse saw her spank M. and put her roughly in the crib. A speech therapist reported hearing the sound of slapping in M.'s room on two separate occasions on the same day. Someone close to the family stated petitioner beat M. with a belt and hit her in the face because she did not eat. Petitioner also picked M. up by the hair causing bald spots.

"The social services agency (agency) took M. into protective custody and filed a dependency petition alleging M. came within the provisions of section 300, subdivisions (a) (serious physical harm), (b) (failure to protect), (e) (severe physical abuse) and (i) (cruelty). The juvenile court ordered M. detained pursuant to the petition and set a combined jurisdictional/dispositional hearing (combined hearing) for August 2008. In its report for the combined hearing, the agency recommended the court deny petitioner reunification services pursuant to section 361.5, subdivision (b)(5), because of the severity of M.'s injuries.

"The combined hearing was continued and conducted as a contested hearing in December 2008. Petitioner testified she and others at the pool were tossing M. back and forth but stated they were doing that with all the children. She denied that M.'s head was going under the water and that she held M.'s head under the water. She denied spanking M. at the hospital but acknowledged patting her on the 'butt.' She denied cussing at M., hitting her with a belt, hitting her in the face or picking her up by the hair. She testified the allegations she abused M. came from her ex-boyfriend's mother who was angry because petitioner told her own mother that her ex-boyfriend hit her. M.'s father, who was a non-offending parent in this case, also testified.

"At the conclusion of the hearing, the juvenile court adjudged M. a minor child described by section 300, subdivisions (a), (b), (e) and (i), ordered her removed from the custody of both parents, denied both parents reunification services as recommended and set a section 366.26 hearing." (*A.S. v. Superior Court* (Mar. 23, 2009) F056575 [nonpub. opn.].)

In advance of the section 366.26 hearing to select and implement a permanent plan for M., the agency's adoption team prepared a written assessment of M., her adoptability, and her foster parents (caregivers) who were committed to adopting her. She had been placed with these caregivers since early January 2009. This was her second out-of-home placement.

The agency recommended the court find it likely that M. would be adopted. The adoption team described M. as a healthy, three-year-old female toddler with no significant developmental delays. If her caregivers became unavailable to adopt her, it was likely another adoptive home would be found for her.

The child was awaiting an evaluation by an ear, nose and throat specialist. Her medical doctor made the referral because the results of a routine hearing test had been questionable. Also, the caregivers reported she snored severely and could not breathe through her nose, leading to a concern of possible sleep apnea. Otherwise, no medical concerns were noted.

Developmentally, M. displayed age appropriate fine and gross motor skills. However, her cognitive and language development was delayed. As a result, she was receiving weekly half-hour speech therapy sessions to work on language development, vocabulary and pronunciation. The speech therapy commenced following an initial Individualized Educational Plan (IEP) assessment for learning disabilities by a speech pathologist, a school psychologist and a special education teacher. M. would begin Head Start in the summer of 2009.

Since her placement in the caregivers' home, her vocabulary had doubled. Notably, one of the caregivers was a high school English teacher. M. currently had a vocabulary of up to 70 words and was beginning to formulate sentences. She loved to be read to and was an attentive listener. When her caregivers did not understand her, she took them by the hand and showed them what she wanted as she tried to pronounce the word(s).

Emotionally, M. was doing well. She was a happy child and demonstrably affectionate. When she was upset, she could be easily soothed. In addition, M. was not diagnosed with any mental disorder.

The preliminary assessment of M.'s caregivers for adoption purposes was favorable. They saw her as their daughter and as part of their family. They wanted her to

thrive and be healthy. They also demonstrated their ability to meet her needs on a consistent day-to-day basis. The couple already had an approved United States Domestic Home Study, which was a step towards adoption.

The court conducted its selection and implementation hearing in late March 2009. Having found it likely M. would be adopted, the court terminated parental rights.

DISCUSSION

I.

Mother challenges the trial court's jurisdictional findings under section 300, subdivisions (a), (e) and (i), as well as its dispositional order denying her reunification services under section 361.5, subdivision (b)(5). She claims she is entitled to our review of these contentions on this appeal from the termination order because, in her view, we did not decide her earlier writ petition on the merits (§ 366.26, subd. (*l*)). As discussed below, we disagree.

The trial court's jurisdictional findings and dispositional findings and orders in this case were not directly appealable orders. Because the trial court, having made those findings and orders, also set a section 366.26 hearing, the trial court's decision was reviewable instead by means of a petition for extraordinary writ review. (§ 366.26, subd. (*l*)(1); Cal. Rules of Court, rules 5.600 & 8.452; *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1023.)

Once a trial court sets a section 366.26 hearing and gives proper notice of the writ remedy, it is incumbent upon a party, who wants to challenge the trial court's setting order, to file a timely petition for extraordinary writ review that substantively addresses the specific issues to be challenged and supports the challenge by an adequate record. (§ 366.26, subd. (*l*)(1)(A) & (B).) Failure to file a timely petition for extraordinary writ review, to substantively address the specific issues challenged, or to support that challenge by an adequate record precludes subsequent review by appeal of the trial court's findings and orders. (§ 366.26, subd. (*l*)(2).)

If, on the other hand, a party challenging the setting order has complied with these requirements, the law encourages the appellate court to determine the writ petition on its merits. (§ 366.26, subd. (*l*)(4).) In the event the appellate court summarily denies or otherwise decides such a petition for extraordinary writ review not on the merits, issues raised by the petition are reviewable on appeal from a section 366.26 order. (§ 366.26, subd. (*l*)(1); *In re Charmice G.* (1998) 66 Cal.App.4th 659, 666.)

As mentioned at the outset, mother filed a petition for extraordinary writ review in which she alleged her "attorney failed to present key factors pertaining to my case, and didn[']t perpair *[sic]* me." She did not specify what key information was not presented or explain how her attorney could have better prepared her for taking the stand. She also did not identify which of the trial court's findings or orders her attorney's alleged failing impacted.

To her claim that her attorney was ineffective, mother failed to substantively address that specific issue as well as support it by an adequate record. (§ 366.26, subd. (*l*)(1)(B).) As a consequence, strict adherence to section 366.26, subdivision (*l*), would have justified a determination by this court that mother filed an inadequate petition and was therefore precluded from subsequent review by appeal. (§ 366.26, subd. (*l*)(1)(B) & (2); *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 577-578.)

However, given section 366.26, subdivision (*l*)'s encouragement to determine the writ petition on its merits (§ 366.26, subd. (*l*)(4)), this court exercised its discretion to nonetheless review mother's petition on its merits. Interpreting her allegation as a claim of ineffectiveness of counsel, we determined that claim failed for reasons which we explained.

Mother nevertheless claims our opinion did not address her ineffective assistance claim on the merits. In her view, our analysis of her ineffective assistance claim was limited to the trial court's disposition. She also criticizes us for not addressing in our written opinion: the fact that her attorney did not object on hearsay grounds to the

evidence supporting jurisdiction; and the trial court's comment that there was some reason to believe one eyewitness was "not all that credible."

Mother's new arguments do not mean our earlier opinion was not decided on the merits. Our opinion was a decision that resolved the merits of her ineffective assistance claim based on the pertinent law and the record evidence. We did not employ discretionary grounds, that is policy grounds unrelated to the petition's procedural or substantive merits, to summarily deny her petition. (See *Consumers Lobby Against Monopolies v. PUC* (1979) 25 Cal.3d 891, 901 & fn. 3; *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 806-807.)

Mother's claim otherwise assumes she was entitled to our independent review of the record. She was not. (See *In re Sade C.* (1996) 13 Cal.4th 952, 994; *Glen C. v. Superior Court*, *supra*, 78 Cal.App.4th at pp. 579-580.) We are not required to do mother's work. (See *Anthony D. v. Superior Court* (1998) 63 Cal.App.4th 149, 157.)

In the end, mother wants essentially nothing more than a second bite at the appellate apple. Having previously decided mother's petition on the merits, we conclude the trial court's findings and orders resulting in the order setting the section 366.26 hearing are not reviewable on this appeal. (*In re Julie S.* (1996) 48 Cal.App.4th 988, 991.)

II.

Mother also challenges the sufficiency of the evidence to support the trial court's finding that M. was likely to be adopted. She contends there was no substantial evidence that M. was generally adoptable and that in fact the child had special needs which rendered her only specifically adoptable. She in turn claims the court should have assessed whether M.'s caregivers could meet her special needs and whether there was any legal impediment to their adopting M. As discussed below, we disagree.

The issue of adoptability focuses on the child, e.g., whether the child's age, physical condition, and emotional state make it difficult to find a person willing to adopt

the minor. All that is required is clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time. (*In re Zeth S.* (2003) 31 Cal.4th 396, 406.) Although there need not be a prospective adoptive family figuratively waiting in the wings (§ 366.26, subd. (c)(1)), a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.) The law does not require a finding that a child is generally adoptable. (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1313.)

In this case, there was substantial evidence to support the trial court's adoptability finding. M. was a very young, generally healthy and happy child. Although her cognitive and language development was delayed, she was receiving services to address these delays and was showing signs of progress. In addition, her caregivers were committed to adopting her. It also appeared from the record that she was doing well in their home and they were able to meet her needs. Further, according to the adoption team, if her caregivers became unavailable to adopt her, it was likely another adoptive home would be found for her.

Mother disregards this evidence and instead speculates M. had undiagnosed special needs that might make M. only specifically adoptable. For instance, mother assumes M.'s IEP assessment was incomplete and thus the agency could not say the child had no significant developmental delays. We disagree with mother's reading of the record. The child's initial assessment was complete according to the evidence and as a result she was seeing a speech therapist on a weekly basis and she would begin Head Start in the summer.

Mother also speculates M. had untreated and significant emotional and mental problems. M. reportedly had stopped talking and eating regularly six months before sustaining her life-threatening injuries. Mother attributed these behaviors to M.'s having witnessed separate incidents of domestic violence involving mother and the maternal

grandparents. It appears, however, according to the balance of the record that M. had resumed talking and eating regularly after she was removed from mother's custody and by the time of the adoption assessment. There was no expressed medical concern that M. was underweight or that her speech delay was brought on by unresolved trauma.

Mother was also afraid that M. had been molested because she had been putting her finger in her vaginal area. Mother reported, however, doctors who examined the child informed mother that M.'s decrease in talking and touching herself were normal. There was also no reported concern by either her physician or the caregivers at the time of the adoption assessment that M. was inappropriately touching herself.

In any event, mother assumes the agency did not seek a mental health assessment for M. in connection with these earlier reports. The fact that the record does not contain a mental health assessment for M., however, does not necessarily mean that no mental health assessment was performed. We note in this respect the adoption team reported that M. was not diagnosed with any mental disorder, suggesting that some type of assessment may have been conducted.

Mother's arguments are, at best, over potentially conflicting evidence. However, our appellate authority begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.) All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the decision, if possible. (*Ibid.*) This court's authority to review the record for substantial evidence does not afford us the opportunity to reweigh the evidence or engage in speculation, as mother would have us do. We may not reweigh or express an independent judgment on the evidence. (*In re Laura F.* (1983) 33 Cal.3d 826, 833.)

To the extent mother also raises questions regarding the caregivers, such questions are arguably irrelevant because it does not appear the likelihood of M.'s adoption hinged

on her caregiver's commitment to adopt her. Nevertheless, mother fails to cite and we know of no authority mandating that caregivers who are committed to adopting a dependent child must have an approved adoption home study before the court can terminate parental rights. We do note, however, the caregivers already had an approved home study, which the adoption team characterized as a step toward adoption. Also, there is no requirement of additional approved families available to adopt a dependent child. (*In re A.A., supra*, 167 Cal.App.4th at pp. 1313-1314.) A trial court *may* consider whether a family can meet the particular needs of a child if that child is deemed adoptable solely on the family's willingness to adopt. (*Id.* at p. 1315.) It is not mandatory however. Here, the caregivers were meeting M.'s needs and she appeared to be doing well in their care.

III.

In his appeal, father contended the trial court abused its discretion by denying his request (§ 388) to regain custody. Having reviewed the record, we concluded his argument was meritless.

DISPOSITION

The order terminating parental rights is affirmed.